

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID LOREN WALDECK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans

BRIEF OF APPELLANT

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A. INTRODUCTION

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld and the identity of a controlled substance is an essential element where it increases the maximum sentence. Where the State charged David Loren Waldeck with delivering heroin, the State must prove that he delivered heroin and that he knew that the controlled substance delivered was heroin. The to convict jury instructions given by the trial court did not identify the controlled substance as heroin, an essential element of delivery. Consequently, the trial court exceeded its authority by sentencing Waldeck for delivery of heroin, requiring remand and resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a to convict instruction which failed to identify the controlled substance as heroin.

2. The trial court exceeded its authority by sentencing Waldeck for delivery of heroin.

3. The trial court erred in imposing legal financial obligations without any inquiry into Waldeck's ability to pay.

4. In the event the State substantially prevails on appeal this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The identity of a controlled substance is an essential element of the crime of delivery. Did the trial court err in giving a to convict instruction that failed to identify the controlled substance as heroin?

2. A sentencing court exceeds its authority when it imposes a sentence not authorized by the jury's findings. The jury found that Waldeck delivered a controlled substance. Did the trial court exceed its authority by sentencing Waldeck for delivery of heroin?

3. A sentencing court must conduct an individualized inquiry into a defendant's current and future ability to pay before imposing legal financial obligations. Did the trial court err in imposing legal financial obligations without any inquiry into Waldeck's ability to pay?

4. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Waldeck is presumably still indigent where there has been no evidence provided to this Court, and there is no reason to believe, that his financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE¹

1. Procedure

On April 27, 2017, the State charged appellant, David Loren Waldeck, with two counts of delivery of a controlled substance, to wit: heroin and one count of delivery of a controlled substance with a school bus stop enhancement. CP 1-3. The State amended the information on January 12, 2017, charging Waldeck with three counts of delivery of a controlled substance, to wit: heroin and gave notice of intent to seek an exceptional sentence. CP 10-12.

During pretrial hearings, on January 17, 2017, Waldeck moved to represent himself. 01/17/17 RP 17-22. The court granted Waldeck's motion, allowing him to proceed pro se with standby counsel. 01/17/17 RP 22-24.

The trial began on February 28, 2017, before the Honorable Michael Evans. 02/28/17 RP 5. A jury found Waldeck guilty as charged on March 2, 2017. 03/02/17 RP 46-51; CP 65-67.

On April 11, 2017, the court sentenced Waldeck to 112 months in confinement with 8 months community custody and imposed legal financial obligations. 04/11/17 RP 64-67; CP 71-84.

¹ The verbatim report of proceedings are referenced by the date and page number.

Waldeck filed a timely appeal. CP 86-10.

2. Facts

Detective Brian Durbin works in the Street Crime Unit of the Longview Police Department. 02/28/17 RP 110-11. Durbin works with confidential informants on controlled buys. 02/28/17 RP 115-18. He worked with confidential informant, Tia Miller, to conduct three controlled buys with Waldeck. 02/28/17 RP 123-24, 137, 142, 145-46. Miller agreed to work with the Street Crime Unit to avoid facing felony drug charges. 02/28/17 RP 185-87. After completing the first controlled buy, Durbin decided to continue to work with Miller despite suspected heroin found in her car which was a violation of her contract. 02/28/17 RP 135-37. Waldeck stipulated that the Washington State Patrol Crime Lab tested the evidence and found it contained heroin. 03/01/17 RP 169-70.

a. Controlled Buy on November 10, 2015

Durbin testified that he met with Miller, viewed text messages between her and Waldeck, and took photographs of the text messages. 02/28/17 RP 125-26. He searched her and provided her with buy money. Then he and another detective drove her to a predetermined drop-off location. Miller got out and walked to a Longview Safeway where she made contact with Waldeck. 02/28/17 RP 126-30. Thereafter, Miller returned and gave him the suspected controlled substance. He logged in the

controlled substance at the police department and requested testing of the evidence. 02/28/17 RP 130-31.

Miller testified that she arranged a controlled buy with Waldeck through text messages. They agreed to meet at a Longview Safeway. 02/28/17 RP 187-91. Waldeck was parked in the Safeway parking lot. She walked up to his car, gave him the money, and he handed her the heroin. 02/28/17 RP 195-97. She turned the evidence over to Durbin. 02/28/17 RP 197-98.

Detective Sarah Brent and another officer videotaped the controlled buy from their vehicle parked near Safeway. 02/28/17 RP 42-44, 51-57.

b. Controlled Buy on January 29, 2016

Durbin testified that he met with Miller, looked at her cell phone, and took photographs of text messages between her and Waldeck. 02/28/17 RP 137-39. After he searched Miller and Detective Mortensen searched her car, they followed Miller as she drove to a Longview Safeway. They parked down the street while Miller made contact with Waldeck. 02/28/17 RP 137-42. Miller gave him the drugs back at a predetermined location. He returned to the police department and logged in the evidence for testing. 02/28/17 RP 142-43.

Miller testified that she arranged a controlled buy with Waldeck and they agreed to meet at Safeway. 02/28/17 RP 199-202. She drove to the

Safeway where Waldeck was parked. She walked to his car, got in, and gave him the money provided by Durbin. Waldeck handed her the heroin and she left. She drove back to the location where Durbin was waiting and she gave him the heroin. 02/28/17 RP 204-08.

Detective Calvin Ripp and another detective videotaped the controlled buy from their vehicle parked in a corner of the Safeway parking lot. 03/01/17 RP 69-79.

c. Controlled Buy on February 3, 2016

Durbin testified that he met with Miller and took photographs of text messages between her and Waldeck arranging to meet at the Daily Store in Kelso. 02/28/17 RP 145-46, 150-51. Durbin previously obtained authorization for a wire, which he attached to Miller. 02/28/17 RP 147, 178-79. Miller drove to the Daily Store as he and Detective Mortensen followed her. 02/28/17 RP 148. After Miller made contact with Waldeck, they met with her again and she handed them the drugs. He returned to the police department and logged in the evidence. 02/28/17 RP 148-50.

Miller testified that she and Waldeck agreed to meet at the Daily Store. 02/28/17 RP 208-211. She consented to wearing a wire to have the transaction recorded. 02/28/17 RP 213-14. She drove to the Daily Store with Durbin following her and she parked. Waldeck approached her car and got in. She handed him the buy money and he gave her the heroin.

After Waldeck left, she drove back to meet with the detectives. 02/28/17 214-15.

Detective Jordan Sanders and another detective videotaped the controlled buy from their vehicle parked nearby. 03/01/17 RP 157-65.

d. Defense Witnesses

Robert Christopher testified that Waldeck lived at his home in Port Orchard from April 2015 to March 2016. Waldeck was under the supervision of the Department of Corrections during that time. 03/01/17 RP 189-91. John Robarge from the Department of Corrections explained the department's policies and procedures regarding offenders who are under its supervision, including investigating potential violations. 03/01/17 RP 198-215.

e. Jury Instructions

During a discussion of the to-convict jury instructions, Waldeck asked the court if "where it says 'controlled substance,' can that be specific to say heroin?" 03/01/17 RP 226. The court responded by referring to the other jury instructions which defined delivery and heroin. The court explained that "given the circumstances of this case where there's -- the only evidence that the State has proffered or put forward is -- is heroin, I'm inclined just to say 'controlled substance,' because there's been no -- there's no real confusion that would come from it if I were to leave it as is."

03/01/17 RP 226-27. The court gave the to convict instructions which did not identify the controlled substance as heroin. CP 59-61.

E. ARGUMENT

1. WALDECK'S SENTENCES MUST BE REVERSED BECAUSE THE TO CONVICT INSTRUCTIONS DID NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT THE HE DELIVERED HEROIN AND KNEW THAT THE SUBSTANCE DELIVERED WAS HEROIN.

Courts review alleged error in jury instructions de novo. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). The failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

A “to convict jury instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)(quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). “A reviewing court may not rely on other instructions to supply the element missing from the to convict instruction. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)(citing *Smith*, 131 Wn.2d at 262-63).

The identity of the controlled substance is an essential element where it increases the maximum sentence. *State v. Goodman*, 150 Wn.2d

774, 785-86, 83 P.3d 410 (2004)(citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Delivery of heroin is a class B felony with a maximum sentence of ten years, whereas delivery of certain other controlled substances is a class C felony with a maximum sentence of five years. RCW 69.50.401(2)(b)(c); RCW 9A.20.021. Therefore, the identity of the controlled substance in this case determined the level of the crime and its penalty, rendering it an essential element. *Goodman*, 150 Wn.2d at 785-86.

The trial court gave the following to convict instructions: ²

To convict the defendant of the crime of Delivery of a Controlled Substance as charged in [Count I][Count II][Count III], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about [November 10, 2015][January 29, 2016][February 3, 2016], the defendant delivered a controlled substance,

(2) That the defendant knew that the substance delivered was a controlled substance; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 59-61

In *State v. Sibert*, 196 Wn.2d. 306, 230 P.3d 142 (2010), a four-justice plurality of the Washington Supreme Court held that the failure to

² The State proposed the instructions based on WPIC 50.06. CP 38-40.

specify the identity of the controlled substance in the to convict instruction was not error where the instruction incorporated the drug identity by reference to the charging document, which specified methamphetamine and only that drug was proven at trial. *Sibert*, 196 Wn.2d at 312-13. The Court reasoned that where the jury instruction began by stating “[t]o convict the Defendant . . . of the crime of Delivery of a Controlled Substance *as charged*,” the reference to the charging document impliedly incorporates the language “to-wit: Methamphetamine” into the to convict instruction. *Sibert*, 196 Wn.2d at 312. With a fifth justice concurring in the result only, the plurality affirmed Sibert’s conviction and sentence. *Sibert*, 196 Wn.2d at 317.

However, this Court in *State v. Clark-El*, 196 Wn. App. 614, 384 P.3d 627 (2016), concluded that “Siebert does not compel us to hold that the instruction was free of error.” *Clark-El*, 196 Wn. App. at 619. Although the to convict instruction in *Clark-El* did not include the “as charged” language, the Court observed that more importantly, a plurality opinion “has limited precedential value and is not binding on the courts,” *Clark-El*, 196 Wn. App. at 619 (quoting *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)). “It is not possible to assess the correct holding of an opinion signed by four justices when, as here, the fifth vote, concurring in the result only, is unaccompanied by an opinion.” *Clark-El*,

196 Wn. App. at 620 (citing *Kailin v. Clallam County*, 152 Wn. App. 974, 985, 220 P.3d 222 (2009)). Noting that *Smith*, *Emmanuel*, and *Mills* continue to be leading cases holding that it is error to give a to convict instruction that does not contain all the essential elements, the Court concluded that the to convict instruction was erroneous.³ *Id.*

Accordingly, the Court reversed the conviction for delivery of methamphetamine and remanded for resentencing:

The constitutional right to jury trial requires that a sentence must be authorized by a jury's verdict. The sentencing judge imposed a sentence as if the jury had found Clark-El delivered methamphetamine, a class B felony, when the only finding stated in the verdict was that Clark-El was guilty of the crime of delivery of a "controlled substance." That crime is a class C felony when not otherwise specified. The jury's finding that Clark-El delivered an unidentified "controlled substance" authorized the court to impose only the lowest possible sentence for delivery of a controlled substance. If a court imposes a sentence that is not authorized by the jury's verdict, harmless error analysis does not apply.

Clark-El, 196 Wn. App. at 624-25 (citations omitted).

³ The to convict instruction stated:

To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 30th day of October 2014, the defendant delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was a controlled substance;
- and
- (3) That the acts occurred in the State of Washington.

Clark-El, 196 Wn. App. at 619.

The three-justice dissent in *Sibert* concluded that the trial court erred in omitting the identity of the controlled substance in the to convict instructions. *Sibert*, 168 Wn.2d at 318-19. The Court also determined that the sentence imposed was invalid because it exceeded the trial court's authority. "Because the jury found Sibert guilty of delivering and possessing with intent to deliver an unidentified "Controlled Substance," the trial court was not authorized to impose a sentence beyond the enhanced standard range for *any* controlled substance." *Sibert*, 168 Wn.2d at 324-35. The dissent concluded the invalid sentence should be vacated because it violated Sibert's article I, section 21 jury trial right and such errors cannot be harmless. *Sibert*, 168 Wn.2d at 325. In reaching its conclusion, the Court relied on *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) and *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). *Sibert*, 168 Wn.2d at 321-24.

Here, the to convict instruction did not identify the controlled substance as heroin, an essential element of delivery, and the jury found Waldeck guilty of delivery of a controlled substance. CP 59-61, 65-67. Where the plurality opinion in *Siebert* is not binding, this Court should adhere to the sound analysis in *Clark-El* and *Siebert* dissent, which requires reversal of Waldeck's convictions and remand for resentencing.

For resentencing, where the jury found Waldeck guilty of delivery of a controlled substance, the crime is a Class C felony because the controlled substance was not specified. *Clark-El*, 196 Wn. App. at 624-25.

2. REMAND FOR A NEW SENTENCING HEARING IS REQUIRED BECAUSE THE TRIAL COURT IMPOSED LEGAL FINANCIAL OBLIGATIONS WITHOUT AN INDIVIDUALIZED INQUIRY INTO WALDECK'S CURRENT AND FUTURE ABILITY TO PAY.

Under RCW 10.01.160(3), “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” In *State v. Blazina*, 182 Wn.2d 187, 344 P.3d 680 (2015), the Washington Supreme Court held that RCW 10.01.160(3) “requires the record to reflect that the sentence judge made an individualized inquiry into the defendant’s current and future ability to pay before the court impose LFOs.” *Blazina*, 182 Wn.2d at 839. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.” *Id.*

The record reflects that the sentencing court made no inquiry at all into whether Waldeck has the ability to pay. 04/11/17 RP 60-67. Without any inquiry, the court imposed \$1550.00 in legal financial obligations. CP 79. Consequently, pursuant to *Blazina*, a remand for a new sentencing hearing is required.

3. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE WALDECK REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d at 835 (citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report

points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Waldeck is indigent. The trial court found that Waldeck is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 101-03. This Court should therefore presume that Waldeck remains indigent because the Rules of Appellate

Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Waldeck's financial condition has improved or is likely to improve. Waldeck is therefore presumably still indigent and this Court should exercise its discretion to not award costs.

F. CONCLUSION

A to convict instruction must include all essential elements of the crime charged and when the identity of a controlled substance increases the maximum sentence, that identity is an essential element.

For the reasons stated, this Court should reverse Waldeck's convictions and remand for resentencing.

DATED this 19th day of December, 2017.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant David Loren Waldeck

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Cowlitz County Prosecutor's Office at Appeals@co.cowlitz.wa.us and David Loren Waldeck, DOC # 951650, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of December, 2017.

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